No. 87-630

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAROSLAW DOBROWSKYJ - - - Petitioner

versus

JEFFERSON COUNTY KENTUCKY;
BREMER ERHLER, COUNTY JUDGE EXECUTIVE;
RICHARD FREY, DIRECTOR, METROPOLITAN CORRECTIONS;
AND UNKNOWN DEFENDANTS, JEFFERSON COUNTY JAIL - - Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 15, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether the petitioner was denied due process of law under the Fourth and Fourteenth Amendments to the United States Constitution when the petitioner was strip searched at the Jefferson County Jail in Louisville, Kentucky, following his arrest on a misdemeanor charge where the decision to strip-search the petitioner was not based on the nature of the charge, the characteristics of the crime, the circumstances of the arrest, or the suspicion of contraband, but rather solely on the movement of the petitioner to another section of the jail?

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1987

JAROSLAW DOBROWOLSKYJ - - - *Petitioner*

v.

JEFFERSON COUNTY KENTUCKY;
BREMER ERHLER, COUNTY JUDGE EXECUTIVE;
RICHARD FREY, DIRECTOR, METROPOLITAN CORRECTIONS;
AND UNKNOWN DEFENDANTS,
JEFFERSON COUNTY JAIL - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Jaroslaw Dobrowolskyj, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 13, 1987.

OPINIONS BELOW

The Opinion affirming the actions of the United States District Court, Western District of Kentucky was rendered by the United States Court of Appeals for the Sixth Circuit on July 13, 1987. That Opinion is reported as *Dobrowolskyj* v. *Jefferson County, Kentucky, et al.*, 823 F. 2nd 985 (6th Cir. 1987). The United

States Court of Appeals for the Sixth Circuit denied petitioner's Petition for Rehearing on August 17, 1987, in an unpublished Order.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 13, 1987. The petitioner's timely Petition for Rehearing was denied on August 17, 1987. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fourth and Fourteenth Amendments to the United States Constitution

STATEMENT OF THE CASE

On April 17, 1984, the petitioner, Jaroslaw Dobrowolskyj, an attorney living in Detroit, Michigan, was leaving a hearing in the Hall of Justice in Louisville, Kentucky, concerning visitation with his child, when he was arrested on a criminal warrant taken out against him by his ex-wife. The criminal warrant charged him with menacing in violation of Kentucky Revised Statutes (KRS) 508.050.[1]

After being brought to the Jefferson County Jail, the petitioner had his personal property removed, and

---

[1]That Statute provides "[a] person is guilty of menacing when he intentionally places another person in reasonable apprehension of eminent physical injury."

was frisked searched. He was taken to a holding cell in the basement of the jail and interviewed there by a pre-trial release officer. Since he was from out of town, his bond was set at $100.00. Even though he had sufficient money with him at the time of the arrest to make bail, he was not allowed to use his own money to secure his release. After several phone calls, the petitioner arranged for a Louisville, Kentucky, attorney to post the bond for him. While awaiting the arrival of the attorney, the petitioner was transferred with other individuals to a back portion of the basement of the jail. As a portion of this transfer, the petitioner, along with six (6) other inmates, was brought into a room and told by a correctional officer to remove all of his clothing. He was then instructed to lift his testicles so that a visual inspection could be made, then told to bend over and spread his buttocks so that an anal inspection could be made. This strip search was conducted in full view of the other detainees who were being transferred to the back section of the Jefferson County Jail.

The Petitioner was in the jail a total of three and one half (3½) hours before his eventual release. The charges against him were eventually dismissed by the Jefferson District Court.

On April 17, 1985, the petitioner filed a Complaint for Deprivation of Civil Rights in the United States District Court, Western District of Kentucky at Louisville. The defendants in that case included Jefferson County, Kentucky; Bremer Erhler, County Judge Ex-

ecutive, Jefferson County; Richard A. Frey, Secretary of Metropolitan Corrections; and Unknown Correctional Officers of the Jefferson County Jail.

The petitioner contended that, under the circumstances of his case, the strip search of his person violated his rights under the Fourth and Fourteenth Amendment to the United States Constitution. As a result, the petitioner requested both compensatory and punitive damages for violation of his civil rights. Additionally, he requested a Declaratory Judgment in regard to the strip search policy of the Jefferson County Jail.

The policy of the Jefferson County Jail in regard to strip searches can best be summarized by the following colloquy which occurred during trial between petitioner's trial counsel and Richard Frey, the Director of the Jefferson County Jail:

> Q. Alright. Mr. Frey, we're talking about here today a strip search which occurred at the jail. Now, can you explain to the jury when a strip search occurs in the basement area of the jail?
>
> A. Yes. Whenever an individual who has been received by the department and has been properly processed is removed from that area I described directly opposite the control room in this area which is contiguous to the pre-trial services.
>
> . . .
>
> Q. Excuse me. Is this the area you call the Holding Cell?
>
> A. That's correct.

Q. OK, I just wanted to make sure I understand.

A. When they are removed from that area to any other area of the jail that has been designated part of the general population, an area in which prisoners of both pre-trial detention as well as those who have already been dealt with by Courts and have not made bond or bail, are housed, when they move physically through those barriers they are actually entering the body of the institution. At that point a strip search is conducted.

Later in the testimony, Mr. Frey was questioned concerning the written policy and procedures of the Jefferson County Jail in regard to strip searches:

Q. Now as far as that policy and procedure, does that describe the official policy that you testified previously, that's in existence not only now but April 17, 1984, as far as strip searches?

A. Yes.

Q. So if I understand you then correctly, it is simply the movement of an individual within the basement section of the jail that determines if you will be strip searched. Is that correct?

A. Correct.

Q. Now what determines that movement?

A. A number of extraneous factors would determine the movement. For instance, if an individual had been received by the department and had a high bond, we would recognize, given what that individual may have told pre-trial services, that the likelihood of him being released was slim. That's an example. Primarily the department

> based upon the total *number of people entering the facility regardless of whether that individual has been arrested for a felony or misdemeanor, regardless of what his bond is based on,* the number of individuals coming into the facility. (emphasis added)

The Sixth Circuit in *Dobrowolskyj* v. *Jefferson County, Kentucky,* 823 F. 2nd, 955, 956 (6th Cir. 1987), summarized the policy of the Jefferson County Jail on strip searches as follows:

> Body cavity searches require a reasonable suspicion that the inmate was concealing contraband. Strip searches do not require that same reasonable suspicion, but were conducted automatically upon movement from one security area to another.

Trial in the case was conducted by the District Court on January 27 and 28, 1986. Prior to trial, the federal District Judge refused to rule on petitioner's Motion for Summary Judgment. During the trial, petitioner's Motion for a Directed Verdict at the end of petitioner's case was denied. Following deliberations, the Jury returned a verdict in favor of the respondents. A Post-trial Motion concerning the Declaratory Request was denied by the District Court.

In his appeal to the United States Court of Appeals for the Sixth Circuit, the petitioner submitted that the automatic strip search policy of the Jefferson County Jail, triggered only by movements within the jail itself, was in direct conflict with the Opinions of other federal Circuit Courts of Appeals. This was the fed-

eral Constitution contention that was denied by the Opinion of the United States Court of Appeals for the Sixth Circuit.

REASON FOR GRANTING THE WRIT

The Decision of the Sixth Circuit in the Case at Bar in Conflict With the Decisions of the Other Federal Circuit Courts of Appeal on the Issue of Strip Searches of Individuals Arrested on Misdemeanor Offenses.

The policy of the Jefferson County Jail in regard to strip searches of inmates is clear. An arrestee will be strip searched at the Jefferson County Jail when he is moved from the holding cell in the front area of the basement of the jail to the security area in the rear section of the basement of the jail. This will occur solely as a result of the holding cell in the front of the jail becoming full, with no consideration as to whether the person was arrested on a felony or a misdemeanor or any other offense. There is no consideration of probable cause, either to the nature of the offense or to the action of the individual. The only factor which triggers the strip search is the individual's movement, and that is determined by the number of people being processed into the jail. There are no other factors which are applied to the decision.

The Fourth Amendment prohibits only unreasonable searches. *Delaware* v. *Prouse,* 440 U. S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). To determine reasonableness, the Courts must balance the legitimate governmental interests promoted by the search against the intrusiveness of the search on the individual.

Illinois v. *LaFayette,* 462 U. S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 665 (1983). A frequently quoted definition of reasonableness appears in *Bell* v. *Wolfish,* 441 U. S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979):

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it required a balancing of the need for the particular search against the invasion of the personal rights that the search entails. The Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id.,* 99 S. Ct. at 1884.

As such, the security interest of a detention facility must be weighed against the privacy interests of the arrestee. This balancing test must be applied in each case, and a particular search must still be reasonable under the Fourth Amendment.

It is clear that a vast majority of the Circuits have held unconstitutional blanket strip searches of all inmates including those detained on minor misdemeanor charges or traffic offenses. Automatic strip searches of all arrestees violate the Fourth Amendment unless there is a reasonable suspicion, based on the nature of the charge, characteristics of the arrestee, or the circumstances of the arrest itself, that the arrestee is concealing contraband. See *Weber* v. *Dell,* 804 F. 2d 796 (2nd Cir. 1986); *Logan* v. *Shealy,* 660 F. 2d 1007 (4th Cir. 1981), *cert. denied,* 102 S. Ct. 1435 (1982);

Stewart v. *Lubbock County, Texas,* 767 F. 2d 153 (5th Cir. 1985); *cert. denied,* 106 S. Ct. 1378 (1986); *Mary Beth G.* v. *City of Chicago,* 723 F. 2d 1263 (7th Cir. 1983); *Jones* v. *Edwards,* 770 F. 2d 739 (8th Cir. 1985); *Giles* v. *Ackerman,* 746 F. 2d 614 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 2114 (1985); *Hill* v. *Bogans,* 735 F. 2d 391 (10th Cir. 1984).

In approving the Constitutionality of the strip search policy of the Jefferson County Jail, the Sixth Circuit in *Dobrowolskyj* v. *Jefferson County, Kentucky,* 823 F. 2nd 935 (6th Cir. 1987), relied upon two factors. First, that the nature of the offense was such as to create a suspicion that the petitioner was concealing a weapon or other contraband. Secondly, that a strip search is justified where the arrestee is moved into the general jail population. *Id.,* at 958-595. The petitioner submits that analysis of the first justification fails to reveal that it has any basis in fact and is consequently invalid. An analysis of the second justification reveals that it is in direct conflict with other federal Courts of Appeals.

In regard, to the first reason, the Sixth Circuit in the petitioner's case stated:

> First, the nature of Dobrowolskyj's charged offense was different than in those cases which held automatic strip search policies unconstitutional because they included persons detained on minor traffic offenses and other misdemeanors not normally associated with weapons or other contraband. Menacing is an offense associated with weapons, and may well raise reasonable suspicion

on the part of the jail officials that a person detained on that charge may be concealing weapons or other contraband. *Id.,* at 958-959.

Initially, it should be noted that the nature of the crime of menacing is such that it is classified as a Class B misdemeanor, the lowest misdemeanor in Kentucky's classification system. See KRS 533.090. Additionally, the actions of the criminal justice personnel indicated that the crime charged was not considered serious. A $100.00 bond was placed on the petitioner because he was from out of state. Mr. Richard Frey, the Director of the Jefferson County jail, testified that this type of bond would indicate that the individual was not necessarily dangerous and was a low security risk. However, more importantly, the nature of the offense and the underlying charge were not considered when determining whether the petitioner should be strip searched. In his testimony in the case below, Mr. Frey specifically stated that the following factors were not considered:

(1) The nature of the offense (TE p. 90);

(2) The individual's appearance or actions in the jail (TE p. 91);

(3) Reports by the arresting officer concerning the individual's actions (TE p. 91);

(4) The individual's prior arrest record (TE p. 91);

(5) Whether the offense involves the use of weapons (TE p. 95);

(6) Whether the offense involves drugs (TE p. 95);

(7) Whether the offense involves the use of any type of contraband (TE p. 95);

(8) The results of the frisk, or pat down search (TE p. 96);

(9) The results of any searches conducted outside the jail (TE p. 96).

The uncontroverted evidence in the petitioner's case indicates that the policy of the Jefferson County Jail in regard to strip searches is that the triggering event is simply the movement of the individual within the basement section of the jail. There is no consideration of the nature of the offense charged. There was no factual predicate for the Sixth Circuit's analysis.

In regard to the aspect of contact with general population, the Sixth Circuit in the petitioner's case stated the following:

> Second, and more important, Jefferson County's policy was not a blanket search of all detainees as in the policies held unconstitutional in the above cases, but a more narrowly drawn policy of searching only those detainees who are required by *force of circumstance* to be moved into the general jail population. Dobrowolskyj was not moved until he had been in the jail for several hours. The move was necessitated by the overcrowding in the front holding cell which had been limited to a capacity of twenty (20) prisoners. . . . There is no indication that Dobrowolskyj was moved as a pretext to search him, or any reason other than *logistical necessity*. *Id.*, at 959; (emphasis added).

In essence, the Sixth Circuit concluded that the jail security interests in and of itself were sufficient and justified the strip search.

The decision of the Sixth Circuit is in sharp conflict with the decisions of other Circuit Courts of Appeal. The decision of the Second Circuit in *Weber* v. *Dell, supra,* is on all-fours with the facts and circumstances of the petitioner's case. In *Weber,* the plaintiff had been arrested and charged for the misdemeanor offenses of falsely reporting an incident and resisting arrest. As a portion of her processing at the Monroe County Jail, "Mrs. Weber was required to remove all her clothing and expose her body cavities for visual inspection." *Id.*, at 799. The Second Circuit described the strip search policy of the Monroe County Jail in the following terms:

> The Monroe County Jail policy appears to subject arrestees to strip/body cavity searches only when the arrestees are unable to make bail immediately, and for reasons such as overcrowding, are moved from the holding cells in which they are initially placed into cells near arraigned inmates. *Id., at* 801.

Faced with the exact same circumstances as those encountered in the petitioner's case, the Second Circuit concluded that the policy was patently unconstitutional:

> We find it unnecessary to remand for finding on those issues, however, because we believe that even a more narrowly drawn policy would be uncon-

> stitutional and that the sheriff's assertion, if substantiated, would still not provide that particularized suspicion [citation omitted] arising either from the nature of the charge or specific circumstances relating to the arrestee and/or the arrest which the law requires for so intrusive and demeaning an investigative procedure as a strip/body cavity search. *Id.,* at 802.

The decision of the Second Circuit in *Weber,* was in accord with the decisions of other federal Circuit Courts of Appeals. For instance, both the Eighth and the Tenth Circuits have concluded that the security interests of a jail are not in and of themselves, sufficient to justify a blanket strip search policy for all arrestees. See *Jones* v. *Edwards, supra,* at 742; *Hill* v. *Bogans, supra,* at 394-395. Rather, as discussed previously, there must be a balancing of the security interests against the privacy interests of the individual involved. When dealing with an individual arrested for a misdemeanor or other minor offense, in order to justify a strip search there must be a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest. *Mary Beth G.* v. *City of Chicago, supra,* at 1272-1273; *Giles* v. *Ackerman, supra,* at 617.

The undisputed facts demonstrate that the petitioner was strip searched at the Jefferson County Jail as a part of a routine standing policy that a strip search was justified when the arrestee had to be moved due to "logistical necessity" as a result of overcrowd-

ing. There was no consideration as to whether probable cause existed to believe the petitioner was concealing a weapon or contraband. Petitioner submits that intrusion on one's personal dignity occasioned by such strip searches require that some justifiable basis for that search exists.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered on July 13, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Radigan, counsel for petitioner, hereby, certify that forty (40) copies of the foregoing Petition for Writ of Certiorari were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and three (3) copies to the Hon. Allen P. Dodd, III and the Hon. R. Allen McCartney, Assistant County Attorneys, 621 West Main Street, Louisville, Kentucky 40202, this 15th day of October, 1987, by personally depositing same in the United States mail. I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-5234; 86-5451

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAROSLAW DOBROWOLSKYJ, - - *Plaintiff-Appellant,*

v.

JEFFERSON COUNTY, KENTUCKY, ET AL., - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Western District of Kentucky

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OPINION — Decided and Filed July 13, 1987

Before: LIVELY, Chief Judge; BOGGS, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

BOGGS, Circuit Judge. Plaintiff-Appellant Jaroslaw Dobrowolskyj was arrested on a misdemeanor charge in Jefferson County, Kentucky, and strip searched while he was being held at the Jefferson County Jail awaiting a lawyer to post his $100 bond. He sued the Jail, its director, and the county, claiming that their policy of strip searching pretrial detainees was unconstitutional. The district court found that the constitutionality of Jefferson County's strip search policy had already been settled by the consent decree in *Tate* v. *Frey*, No. 75-0031(A) (Oct. 1, 1985), a class action which had challenged many pro-

cedures at the jail. The court denied Dobrowolskyj's motions for declaratory judgment, summary judgment and directed verdict. The case was submitted to a jury which returned a verdict for the defendants. Dobrowolskyj appeals the district court's denial of his motions. We hold that Jefferson County's strip search policy is constitutional and accordingly, affirm the rulings of the district court.

Dobrowolskyj, a Michigan resident, was arrested at the Jefferson County Courthouse on April 17, 1984, on a warrant sworn out by his ex-wife. He was charged with menacing, a misdemeanor under Kentucky law. He was taken to the Jefferson County Jail where he had to wait for several hours before he could find a local lawyer to post bond for him. He was first placed in the front holding cell in the basement, the area where arrestees were initially detained during processing by the Department of Corrections and determination as to the likelihood of their being released on bond. If release was imminent, the person would remain in the holding cell, rather than being classified and transferred to one of the main sections of the jail. Detainees in this area were subjected only to a frisk or "pat down" search.

Unfortunately for Dobrowolskyj, other detainees arrived at the jail while he was being held, and the front holding cell, which had a capacity for only twenty prisoners, became overcrowded. Approximately six prisoners, including Dobrowolskyj, had to be moved to the rear security area where the general jail population was housed. The rear security area in the basement was the main traffic area of the jail, through which all inmates were moved on their way to and from court appearances and the upper sections of the jail. This area thus contains a cross-section of the jail's population, including inmates from the maximum security areas. Dobrowolskyj was strip searched be-

fore he was moved to the rear area. The movement and search were in accordance with departmental policy which had been approved by the district court in the *Tate* v. *Frey* consent decree.

The relevant part of the policy read:

> All inmates will be thoroughly searched each time an inmate passes from one security area to another, being prepared for transportation both between floors and externally, and upon admission to the Department. All newly admitted inmates to the Department will be frisk searched upon arrival to the Department and strip searched immediately prior to the movement of the inmate to rear security, female section or other areas of the Department.

The policy also provided that all strip searches would be conducted in private with only one officer unless the inmate's behavior indicated that more than one officer might be required. The officers were always to be of the same sex as the inmate. Strip searches were visual only. The officer was not to touch the inmate, although the policy indicated that body orifices were to be closely inspected. Any manual search was considered a body cavity search, to be carried out only by medical personnel after authorization by the senior officer in charge of the area. Body cavity searches required a reasonable suspicion that the inmate was concealing contraband. Strip searches did not require the same reasonable suspicion, but were conducted automatically upon movement from one security area to another.

Dobrowolskyj sued the jail, arguing that the automatic strip search without reasonable suspicion violated the fourth amendment. The district court held that the constitutionality of the search policy had been settled by the consent decree in *Tate* v. *Frey* approving the policy. The

court denied Dobrowolskyj's motion for declaratory judgment. The court also, denied Dobrowolskyj's motions for summary judgment and directed verdict on the question of liability, and the case was tried by a jury which returned a verdict for the county. Dobrowolskyj appeals the district court's rulings on the constitutionality of the search policy.

The Supreme Court considered the issue of strip searches briefly in *Bell* v. *Wolfish,* 441 U. S. 520 (1979). The Court overturned a lower court decision holding that routine strip searches of pretrial detainees conducted after contact visits violated the fourth amendment absent probable cause to believe that the inmate was concealing contraband. The Court held that these searches were not unreasonable and thus did not violate the fourth amendment. *Bell* sets out a balancing test for reasonableness, stating that the fourth amendment

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559. The Court held that the searches after contact visits could be conducted without probable cause to suspect that a particular inmate was concealing contraband because the unique and serious security interests of the detention facility outweighed the privacy interest of the inmate. *Id.* at 559-560.

Bell has not been read as holding that the security interests of a detention facility will always outweigh the privacy interests of the detainees. The balancing test must be applied in each case and the particular search must still be reasonable under the fourth amendment. The majority

of the circuits have held unconstitutional blanket strip search policies of all inmates including those detained only on minor misdemeanor charges or traffic offenses. These courts have held that automatic strip searches of all detainees violate the fourth amendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband. *See Weber* v. *Dell,* 804 F. 2d 796, 802 (2nd Cir. 1986); *Jones* v. *Edwards,* 770 F. 2d 739 (8th Cir. 1985); *Stewart* v. *Lubbock County, Texas,* 767 F. 2d 153 (5th Cir. 1985) cert. denied, 106 S. Ct. 1378 (1986); *Giles* v. *Ackerman,* 746 F. 2d 614 (9th Cir. 1984), *cert. denied,* 471 U. S. 1053 (1985); *Hill v. Bogans,* 735 F. 2d 391 (10th Cir. 1984); *Mary Beth G.* v. *City of Chicago,* 723 F. 2d 1263 (7th Cir. 1983); *Logan* v. *Shealy,* 660 F. 2d 1007 (4th Cir. 1981), *cert. denied,* 455 U. S. 942 (1982); *Fann* v. *City of Cleveland,* 616 F. Supp. 305 (N.D. Ohio 1985); *Tinetti* v. *Wittke,* 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd,* 620 F. 2d 160 (7th Cir. 1980) (per curiam).

This circuit has previously considered the strip search issue in *Dufrin* v. *Spreen,* 712 F. 2d 1084 (1984). We upheld a strip search of a woman charged with a felony against fourth amendment challenge, holding that the search was reasonable under the balancing test of *Bell* v. *Wolfish* which counselled wide-ranging deference in security matters to prison officials. *Dufrin* distinguished *Logan* and *Tinetti* on the basis of the nature of the charged offenses, and held that the routine search was reasonable under the circumstances, including the facts that

> (a)the arrestee was formally charged with a felony involving violence, (b) that her detention was under circumstances which would subject her potentially to mingle with the jail population as a whole, and (c) that the search actually conducted was visual only, and was

> carried out discreetly and in privacy. Where these circumstances exist, we do not believe that the sheriff is obliged, as a matter of federal constitutional law, to make a subjective evaluation of the underlying nature of the offense or to determine whether a less intrusive search may be employed.

Id. at 1089.

Dobrowolskyj argues that the strip search in his case violated the fourth amendment because it was an automatic search triggered only by his movement within the jail and was not based on a reasonable suspicion that he might be concealing contraband. He distinguishes *Dufrin,* arguing that the holding in that case applies only to persons charged with felonies and should not be extended to accused misdemeanants. He argues that we should follow the opinions of other circuits which have held that blanket searches of all misdemeanor detainees are unreasonable under the fourth amendment balancing test.

Dobrowolskyj's argument is not persuasive. Applying the balancing test of *Bell* v. *Wolfish,* we find that the security interests of the detention officials here are even stronger than they were in *Dufrin.* Looking first at the nature of the offense, Dobrowolskyj was not charged with a traffic offense or other minor misdemeanor, but with menacing, a Class B misdemeanor under Kentucky law. Ky. Rev. Stat. Ann § 508.050 (Baldwin 1987) provides that "[a] person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury." The statute was designed to replace common law simple assault, but was also intended to reach certain conduct which could not be reached under common law assault in some jurisdictions, such as threatening with an unloaded weapon. Ky. Rev. Stat. Ann § 508.050 Kentucky Crime Commission Commentary (Baldwin 1987).

Based on the nature of the menacing charge, the jail officials certainly had as much reason to suspect Dobrowolskyj of concealing weapons or other contraband as did the officials considering the nature of Mrs. Dufrin's charged felony. Mrs. Dufrin was arrested at her home on a warrant which charged that she had beaten her sixteen-year-old stepdaughter with a broom handle two months before the arrest.

Second, the security interests of the jail in this case were stronger than in *Dufrin* as Dobrowolskyj was not searched until he was about to be moved into contact with the general jail population. The necessity for the search was not as great in *Dufrin* as here. Conditions were such that if Mrs. Dufrin had remained at the jail she would eventually have been in contact with the general jail population, but she did not have such contact while she was detained. The jail was not crowded while she was there. She remained alone in an individual cell throughout the night and was released in the morning. Here, Dobrowolskyj did come into contact with the general jail population while he was detained at the jail, and was searched only when that contact was imminent.

This case is distinguishable in two ways from the cases in other circuits holding blanket searches of all persons detained on minor misdemeanor charges unconstitutional.[1]

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[1]Dobrowolskyj is also in a much different procedural posture than the plaintiffs in most of the strip search cases as he is challenging the judgment of the district court after his constitutional claims were fully presented to a jury which returned a verdict against him. Almost all of the other cases involve situations where the district court granted summary judgment to the defendants after holding the search policies constitutional and the circuit court reversed the summary judgment and remanded for further proceedings, or cases where the circuit court affirmed the district

(Footnote Continued on Next Page)

First, the nature of Dobrowolskyj's charged offense was different than in those cases which held automatic strip search policies unconstitutionally because they included persons detained on minor traffic offenses and other misdemeanors not normally associated with weapons or other contraband. Menacing is an offense that is associated with weapons, and may well raise reasonable suspicion on the part of the jail officials that a person detained on that charge may be concealing weapons or other contraband.

Second, and more important, Jefferson County's policy was not a blanket search of all detainees as in the policies held unconstitutional in the above cases, but a more narrowly drawn policy of searching only those detainees who were required, by force of circumstance, to be moved into the general jail population. Dobrowolskyj was not moved until he had been at the jail for several hours. The move was necessitated by the overcrowding in the front holding cell, which had been limited to a capacity of twenty prisoners by the class action consent decree in *Tate* v. *Frey*. There is no indication that Dobrowolskyj was moved as a pretext to search him, or for any reason other than logistical necessity. Although we do not underestimate the intrusion in Dobrowolskyj's case, this more restricted policy has a less intrusive impact on the privacy interests of all detainees than a broader blanket search policy. The search policy also provided that the searches would be conducted in private without degradation or embarrassment to either the inmate or to officer.

(Footnote Continued From Preceding Page)

court's ruling that the search policy was unconstitutional as a matter of law. Only one of these cases, *Jones* v. *Edwards*, 770 F. 2d 739 (8th Cir. 1985), held that the strip search violated the plaintiffs' fourth amendment rights after a jury had returned a verdict for the defendants.

The security interests of the jail in conducting a search at this point were strong. Dobrowolskyj was about to come into direct contact with the general jail population, including prisoners who would then be moved into all sections of the jail. The jail had legitimate interests in preventing the flow of contraband into the other sections of the jail.

The reasonableness of the search policy is also indicated by the fact that it had previously been approved by the district court in the consent decree in *Tate* v. *Frey*. The consent decree in this class action suit attempted to craft a search policy for Jefferson County Jail which was narrowly tailored to meet specific security needs. Applying the balancing test from *Bell*, we find that the security interests of the jail outweigh the privacy interest of the inmates in the circumstances of this case. Thus, Dobrowolskyj's search was not unreasonable and did not violate the fourth amendment. Accordingly, we AFFIRM the judgment of the district court.

No. 86-5234/5451

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAROSLAW DOBROWOLSKYJ, - - *Plaintiff-Appellant,*

v.

JEFFERSON COUNTY,
KENTUCKY, Et Al., - - *Defendants-Appellees.*

ORDER — Filed August 17, 1987

Before: LIVELY, Chief Judge, BOGGS, Circuit Judge and CELEBREZZE, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

Entered by Order of the Court

John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

(2)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-630

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAROSLOW DOBROWOLSKYJ - - Petitioner

versus

JEFFERSON COUNTY, KENTUCKY,
Et Al. - - - - - - - - - Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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34pp

QUESTIONS PRESENTED

Whether the Petitioner was denied due process of law under the Fourth and Fourteenth Amendments to the United States Constitution when the Petitioner was strip searched at the Jefferson County Jail, when said search was conducted in conformity with Federal Court Order in *Tate* v. *Frey*, C-75-0031-L(A).

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LIST OF ALL PARTIES TO THE PROCEEDING

Jaroslow Dobrowolskyj

Michigan .....Plaintiff

Jefferson County, Kentucky

Bremer Ehrler, County/Judge Executive
Jefferson County, Kentucky

Richard A. Frey, Jr., Secretary for Corrections of Jefferson County Department of Corrections

and

Unknown Correctional Officers .....Defendants

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No. 87-630

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAROSLOW DOBROWOLSKYJ - - - *Petitioner*

v.

JEFFERSON COUNTY, KENTUCKY,
Et Al. - - - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Following a trial before jury on January 27 and 28, 1986, and the jury having returned a verdict for the Defendants, Judge Edward H. Johnstone, Chief Judge of the United States District Court for the Western District of Kentucky at Louisville, dismissed *Jaroslow Dobrowolskyj* v. *Jefferson County, et al.*, C-85-0405-L(J) from the court's docket. The Order of the District Court is unreported and is reproduced in Appendix A hereto, *infra,* page 1a. The United States District Court for the Sixth Circuit affirmed the judgment of the District Court, which is reported at 823 F. 2d 985 (6th Cir. 1987).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 13, 1987. The Petitioner's Petition for Re-Hearing was denied on August 17, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

This case involved the Constitutional provisions of the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On April 17, 1984, Jaroslow Dobrowolskyj, an attorney living then in Detroit, Michigan, was arrested at the Hall of Justice in Louisville, Kentucky, pursuant to an arrest warrant preferred by his ex-wife, Mrs. Dobrowolskyj. The criminal warrant charged him with menacing, a violation of K.R.S. 508.050, which provides that "[a] person is guilty of menacing when he intentionally places another person in reasonable apprehension of eminent physical injury."

Dobrowolskyj was interviewed by a pre-trial release officer, an employee of the Kentucky Administrative Office of the Courts, and his bond was established at $100.00. Following his processing into the jail, he was permitted to make several telephone calls to attorneys in Michigan and Kentucky, whereupon he secured a local attorney to post bond for him. During this initial incarceration, he was first confined in

a front holding cell and was only pat-searched or frisk-searched—at no time during the incipient states of his incarceration was he subjected to a strip search.

During his incarceration in the front holding cell, additional prisoners were received by the Corrections Department and, pursuant to *Tate* v. *Frey,* No. 75-0031-L(A), a class action lawsuit, which challenged many procedures of the jail, the population in the front holding cell could not exceed twenty prisoners—at which time and after approximately four hours in the holding cell, Dobrowolskyj and five other prisoners were moved to the rear security area, a separate and distinct area of the jail, wherein the general inmate population is able to comingle. The rear secure area of the jail is the main traffic area through which all inmates are moved, both to and from court, and to other areas and facilities of the Jefferson County Corrections Department. This area contains the most diverse cross-section of the Jail's population, including inmates classified as maximum security. Pursuant to Departmental policy, Dobrowolskyj was strip searched prior to his movement to the rear security area. The movement and search were in accordance with Departmental policy, which had been approved by the District Court in *Tate* v. *Frey, surpa.* The relevant part of the policy reads:

> "All inmates will be thoroughly searched each time an inmate passes from one security area to another, being prepared for transportation, both between floors and externally, and upon admission

> to the Department. All newly admitted inmates to the Department will be frisk searched upon arrival to the Department, and strip searched immediately prior to the movement of the inmate to the rear security, female section, or other areas of the Department."–

The policy further provides that strip searches will be conducted in private with only one officer in attendance unless the inmate's behavior dictates more than one officer be present. Searches are always conducted by an officer of the same sex as the inmates. Strip searches are visual only and the officer does not touch the inmate. Although the Petitioner alleged that the search was conducted in full view of other inmates, he could offer no independent corroboration of that allegation.

Dobrowolskyj argued, both at the trial court and the Court of Appeals, that the automatic strip search provision which engaged at the time the person was transferred from the front holding area to the general inmate population was unconstitutional. The District Court held that the constitutionality of the search policy had been settled by the consent decree, *Tate* v. *Frey, supra,* which had approved the policy.

ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI

As the Sixth Circuit Court of Appeals stated:

> "Second, and more important, Jefferson County's policy was not a blanket search of all detainees as in the policies held unconstitutional in the above

> cases, but a more narrowly drawn policy of searching only those detainees who were required, by force of circumstance, to be moved into the general jail population. Dobrowolskyj was not moved until he had been in the jail for several hours. The move was necessitated by the over-crowding in the front holding cell, which had been limited to a capacity of twenty prisoners by the class action consent decree in *Tate* v. *Frey.*" Slip Opinion p. 7, appendix p. 10a.

In only one instance has the Supreme Court analyzed the rights of prisoners to be free from unreasonable searches and seizures. In *Bell* v. *Wolfish,* 441 U. S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), which held that:

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating, and the place in which it is conducted. (Citations omitted)."

A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. *Bell, id.,* 441 U. S. at 559, 99 S. Ct. at 1884, 60 L. Ed. 2d at 481. The balancing test formulated in *Bell* pits the arrestee's qualified right of

privacy against the correctional facility's interest in insuring the security of its inmates as well as the safety of its own personnel and visitors. It has been observed that whatever privacy rights a free citizen enjoys, those rights are curtailed upon arrest and/or committment by law to a correctional facility. *Bell, supra,* 441 U. S. at 546, 99 S. Ct. at 1883, 60 L. Ed. 2d at 473. Adopting the language of *Price* v. *Johnson,* 334 U. S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 2d 1356 (1948), the Court in *Bell* opined:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a restriction justified by the considerations underlying our penal systems."

Placement in the controlled environment of such a large metropolitan correctional facility following arrest results in a certain loss of privacy and justifyable invasion thereinto. This diminution in the individual's right of privacy is necessitated by the correctional facility's interest in preventing the flow of contraband and dangerous contraband into the jail in order to protect detainees, inmates, correctional personnel, and visitors. Searches, and especially strip and visual cavity searches, are therefore a reasonable concomitient of detention inasmuch as they permit correctional officers to shut off the singular most prevalent and dangerous port of entry for contraband and distribution within the facility of contraband. While submitting to a strip or visual cavity search by a correctional officer may be degrading and intrude upon the

individual's right of privacy causing the court in *Bell* to pause—the institutional and state interest is in this setting superior to the individual's interest of privacy. Absent is a showing of clear abuse or wanton misconduct on the part of a correctional facility, a strip search policy of the kind herein challenged must be sustained under *Bell* v. *Wolfish.*

It is interesting to note that following the strip search of the person immediately prior to his assignment to the general inmate population, the person will be sharing open showers, open urinals-lavatories, and dressing and undressing continuously in the presence of other inmates and correctional personnel. As a point of departure, the strip search is in all probability the last time the inmate will have any modicum of privacy during the remainder of his incarceration and is the most private moment that he will enjoy while incarcerated.

The Sixth Circuit Court of Appeals has expressly adopted a line of reasoning in holding that the visual search of an arrestee conducted at a county jail by an officer of the same sex, does not violate the Fourth Amendment rights of the arrestee. *Dufrin* v. *Spreen,* 712 F. 2d 1084 (6th Cir., 1983).

The Departmental search policy herein challenged by the Plaintiff is less offensive on its face and in actual execution than either of those upheld in *Bell* or *Dufrin, supra.* While the decisions in *Bell* and *Dufrin* could be denominated indiscriminate search policies, the policy employed by the Jefferson County Corrections Department by no means subjects every detainee

to a strip search. According to Director Frey, only approximately 8,000 to 8,500 detainees per year out of a total received inmate population of approximately 36,000 individuals undergo a strip search. Approximately 28,000 individuals initially booked by the Jefferson County Corrections Department are released prior to transfer to the general inmate population and therefore are released prior to a strip search. Implementation of the strip search policy is triggered only when arrestees accumulate in the holding area of the correctional facility and are thereafter transferred to the general inmate population. It is in this area that they are intermingled with the general inmate population and classified to various housing areas in the Department. Within the general inmate population, there are approximately one or two guards per approximately sixty-two inmates as opposed to one guard per every two to three inmates in the front holding cell area, an approximately thirty-fold decrease in direct supervision by the correctional staff.

Because the general inmate population is less heavily guarded and contains members of the general jail population awaiting court appearances, it is necessary to conduct thorough searches of the individuals transferred thereto to prevent the introduction of contraband into the main inmate population. As in *Bell* and *Dufrin,* the institution's interest in protecting its inmates, employees and visitors is paramount to the individual's qualified right of privacy.

Moreover, the Supreme Court has acknowledged that "wide ranging deference" must be accorded to

those in charge of correctional facilities, since they are best situated to decide the extent to which more liberal policies and practices may safely be adopted consistent with internal order, discipline and security. *Bell, supra,* 441 U. S. at 547, 99 S. Ct. at 1883, 60 L. Ed. 2d at 474.

CONCLUSION

The stipulation of settlement of class action in *Tate* v. *Frey,* is controlling upon all members of the class as certified pursuant to the Federal Rules of Civil Procedure, Rule 23(a) and 23(b)(2). Plaintiff is a member of the class as certified and the search issues addressed by the stipulation for settlement of class action are exhaustive and binding upon the Plaintiff. The policy of the Jefferson County Corrections Department with respect to detainee's strip searches is not a blanket policy but in fact only approximately 23% of the individuals admitted to the facility are subjected to a strip search, which is conducted in private by an employee of the same sex as the detainee and immediately prior to the inmate's transfer from a holding area to the general inmate population.

Therefore, the jury verdict for the Defendants herein which was subsequently affirmed by the Sixth Circuit Court of Appeals should not be reviewed by

this court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing Defendants/Appellees' Brief were mailed to Mr. William P. Radigan, Attorney for Petitioner/Appellant, 800 Republic Building, 429 West Muhammad Ali Boulevard, Louisville, Kentucky, 40202, on this 15th day of January, 1988.

ALLEN P. DODD, III

APPENDIX

APPENDIX

Civil Action No. 85-0405 L(J)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAROSLAW DOBROWOLSKYJ

v.

JEFFERSON COUNTY, Et Al.

ORDER—Entered January 28, 1986

The trial of this action was held on January 27 and 28, 1986. The jury returned a verdict for the defendant, Richard Frey, in his capacity as Jefferson County Corrections Department.

IT IS HEREBY ORDERED that this action is DISMISSED from the docket of the Court.

This 28th day of January, 1986.

(s) Edward H. Johnstone
Chief Judge
United States District Court

cc: Counsel

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-5234; 86-5451

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAROSLAW DOBROWOLSKYJ, - - *Plaintiff-Appellant,*

v.

JEFFERSON COUNTY, KENTUCKY;
Et Al., - - - - - *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Decided and Filed July 13, 1987

Before: LIVELY, Chief Judge; BOGGS, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

BOGGS, Circuit Judge. Plaintiff-Appellant Jaroslaw Dobrowolskyj was arrested on a misdemeanor charge in Jefferson County, Kentucky, and strip searched while he was being held at the Jefferson County Jail awaiting a lawyer to post his $100 bond. He sued the jail, its director, and the county, claiming that their policy of strip searching pretrial detainees was unconstitutional. The district court found that the constitutionality of Jefferson County's strip search policy had already been settled by the consent decree in *Tate* v. *Frey,* No. 75-0031(A) (Oct. 1, 1985), a class action which had challenged many procedures at the jail. The court denied Dobrowolskyj's motions for declaratory judgment, summary judgment and directed verdict. The case

was submitted to a jury which returned a verdict for the defendants. Dobrowolskyj appeals the district court's denial of his motions. We hold that Jefferson County's strip search policy is constitutional and accordingly, affirm the rulings of the district court.

Dobrowolskyj, a Michigan resident, was arrested at the Jefferson County Courthouse on April 17, 1984, on a warrant sworn out by his ex-wife. He was charged with menacing, a misdemeanor under Kentucky law. He was taken to the Jefferson County Jail where he had to wait for several hours before he could find a local lawyer to post bond for him. He was first placed in the front holding cell in the basement, the area where arrestees were initially detained during processing by the Department of Corrections and determination as to the likelihood of their being released on bond. If release was imminent, the person would remain in the holding cell, rather than being classified and transferred to one of the main sections of the jail. Detainees in this area were subjected only to a frisk or "pat down" search.

Unfortunately for Dobrowolskyj, other detainees arrived at the jail while he was being held, and the front holding cell, which had a capacity for only twenty prisoners, became overcrowded. Approximately six prisoners, including Dobrowolskyj, had to be moved to the rear security area where the general jail population was housed. The rear security area in the basement was the main traffic area of the jail, through which all inmates were moved on their way to and from court appearances and the upper sections of the jail. This area thus contains a cross-section of the jail's population, including inmates from the maximum security areas. Dobrowolskyj was strip searched before he was moved to the rear area. The movement and search were in accordance with departmental policy which had

been approved by the district court in the *Tate* v. *Frey* consent decree.

The relevant part of the policy read:

> All inmates will be thoroughly searched each time an inmate passes from one security area to another, being prepared for transportation both between floors and externally, and upon admission to the Department. All newly admitted inmates to the Department will be frisk searched upon arrival to the Department and strip searched immediately prior to the movement of the inmate to rear security, female section or other areas of the Department.

The policy also provided that all strip searches would be conducted in private with only one officer unless the inmate's behavior indicated that more than one officer might be required. The officers were always to be of the same sex as the inmate. Strip searches were visual only. The officer was not to touch the inmate, although the policy indicated that body orifices were to be closely inspected. Any manual search was considered a body cavity search, to be carried out only by medical personnel after authorization by the senior officer in charge of the area. Body cavity searches required a reasonable suspicion that the inmate was concealing contraband. Strip searches did not require the same reasonable suspicion, but were conducted automatically upon movement from one security area to another.

Dobrowolskyj sued the jail, arguing that the automatic strip search without reasonable suspicion violated the fourth amendment. The district court held that the constitutionality of the search policy had been settled by the consent decree in *Tate* v. *Frey* approving the policy. The court denied Dobrowolskyj's motion for declaratory judgment. The court also denied Dobrowolskyj's motions for summary judgment and directed verdict on the question of

liability, and the case was tried to a jury which returned a verdict for the county. Dobrowolskyj appeals the district court's rulings on the constitutionality of the search policy.

The Supreme Court considered the issue of strip searches briefly in *Bell* v. *Wolfish*, 441 U. S. 520 (1979). The Court overturned a lower court decision holding that routine strip searches of pretrial detainees conducted after contact visits violated the fourth amendment absent probable cause to believe that the inmate was concealing contraband. The Court held that these searches were not unreasonable and thus did not violate the fourth amendment. *Bell* sets out a balancing test for reasonableness, stating that the fourth amendment

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559. The Court held that the searches after contact visits could be conducted without probable cause to suspect that a particular inmate was concealing contraband because the unique and serious security interests of the detention facility outweighed the privacy interest of the inmate. *Id.* at 559-560.

Bell has not been read as holding that the security interests of a detention facility will always outweigh the privacy interests of the detainees. The balancing test must be applied in each case and the particular search must still be reasonable under the fourth amendment. The majority of the circuits have held unconstitutional blanket strip search policies of all inmates including those detained only on minor misdemeanor charges or traffic offenses. These courts have held that automatic strip searches of all de-

tainees violate the fourth amendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband. *See Weber* v. *Dell,* 804 F. 2d 796, 802 (2nd Cir. 1986); *Jones* v. *Edwards,* 770 F. 2d 739 (8th Cir. 1985); *Stewart* v. *Lubbock County, Texas,* 767 F. 2d 153 (5th Cir. 1985) *cert. denied,* 106 S. Ct. 1378 (1986); *Giles* v. *Ackerman,* 746 F. 2d 614 (9th Cir. 1984), *cert. denied,* 471 U. S. 1053 (1985); *Hill* v. *Bogans,* 735 F. 2d 391 (10th Cir. 1984); *Mary Beth G.* v. *City of Chicago,* 723 F. 2d 1263 (7th Cir. 1983); *Logan* v. *Shealy,* 660 F. 2d 1007 (4th Cir. 1981), *cert. denied,* 455 U. S. 942 (1982); *Fann* v. *City of Cleveland,* 616 F. Supp. 305 (N.D. Ohio 1985); *Tinetti* v. *Wittke,* 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd,* 620 F. 2d 160 (7th Cir. 1980) (per curiam).

This circuit has previously considered the strip search issue in *Dufrin* v. *Spreen,* 712 F. 2d 1084 (1984). We upheld a strip search of a woman charged with a felony against fourth amendment challenge, holding that the search was reasonable under the balancing test of *Bell* v. *Wolfish* which counselled wide-ranging deference in security matters to prison officials. *Dufrin* distinguished *Logan* and *Tinetti* on the basis of the nature of the charged offenses, and held that the routine search was reasonable under the circumstances, including the facts that

> (a) the arrestee was formally charged with a felony involving violence, (b) that her detention was under circumstances which would subject her potentially to mingle with the jail population as a whole, and (c) that the search actually conducted was visual only, and was carried out discreetly and in privacy. Where these circumstances exist, we do not believe that the sheriff is obliged, as a matter of federal constitutional law, to make a subjective evaluation of the underlying nature

> of the offense or to determine whether a less intrusive search may be employed.

Id. at 1089.

Dobrowolskyj argues that the strip search in his case violated the fourth amendment because it was an automatic search triggered only by his movement within the jail and was not based on a reasonable suspicion that he might be concealing contraband. He distinguishes *Dufrin,* arguing that the holding in that case applies only to persons charged with felonies and should not be extended to accused misdemeanants. He argues that we should follow the opinions of other circuits which have held that blanket searches of all misdemeanor detainees are unreasonable under the fourth amendment balancing test.

Dobrowolskyj's argument is not persuasive. Applying the balancing test of *Bell* v. *Wolfish,* we find that the security interests of the detention officials here are even stronger than they were in *Dufrin.* Looking first at the nature of the offense, Dobrowolskyj was not charged with a traffic offense or other minor misdemeanor, but with menacing, a class B misdemeanor under Kentucky law. Ky. Rev. Stat. Ann § 508.050 (Baldwin 1987) provides that "[a] person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury." The statute was designed to replace common law simple assault, but was also intended to reach certain conduct which could not be reached under common law assault in some jurisdictions, such as threatening with an unloaded weapon. Ky. Rev. Stat. Ann § 508.050 Kentucky Crime Commission Commentary (Baldwin 1987). Based on the nature of the menacing charge, the jail officials certainly had as much reason to suspect Dobrowolskyj of concealing weapons or other contraband as did the officials considering the nature of Mrs. Dufrin's

charged felony. Mrs. Dufrin was arrested at her home on a warrant which charged that she had beaten her sixteen-year-old stepdaughter with a broom handle two months before the arrest.

Second, the security interests of the jail in this case were stronger than in *Dufrin* as Dobrowolskyj was not searched until he was about to be moved into contact with the general jail population. The necessity for the search was not as great in *Dufrin* as here. Conditions were such that if Mrs. Dufrin had remained at the jail she would eventually have been in contact with the general jail population, but she did not have such contact while she was detained. The jail was not crowded while she was there. She remained alone in an individual cell throughout the night and was released in the morning. Here, Dobrowolskyj did come into contact with the general jail population while he was detained at the jail, and was searched only when that contact was imminent.

This case is distinguishable in two ways from the cases in other circuits holding blanket searches of all persons detained on minor misdemeanor charges unconstitutional.[1] First, the nature of Dobrowolskyj's charged offense was

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[1]Dobrowolskyj is also in a much different procedural posture than the plaintiffs in most of the strip search cases as he is challenging the judgment of the district court after his constitutional claims were fully presented to a jury which returned a verdict against him. Almost all of the other cases involve situations where the district court granted summary judgment to the defendants after holding the search policies constitutional and the circuit court reversed the summary judgment and remanded for further proceedings, or cases where the circuit court affirmed the district court's ruling that the search policy was unconstitutional as a matter of law. Only one of these cases, *Jones* v. *Edwards,* 770 F. 2d 739 (8th Cir. 1985), held that the strip search violated the plaintiff's fourth amendment rights after a jury had returned a verdict for the defendants.

different than in those cases which held automatic strip search policies unconstitutional because they included persons detained on minor traffic offenses and other misdemeanors not normally associated with weapons or other contraband. Menacing is an offense that is associated with weapons, and may well raise reasonable suspicion on the part of the jail officials that a person detained on that charge may be concealing weapons or other contraband.

Second, and more important, Jefferson County's policy was not a blanket search of all detainees as in the policies held unconstitutional in the above cases, but a more narrowly drawn policy of searching only those detainees who were required, by force of circumstance, to be moved into the general jail population. Dobrowolskyj was not moved until he had been at the jail for several hours. The move was necessitated by the overcrowding in the front holding cell, which had been limited to a capacity of twenty prisoners by the class action consent decree in *Tate* v. *Frey*. There is no indication that Dobrowolskyj was moved as a pretext to search him, or for any reason other than logistical necessity. Although we do not underestimate the intrusion in Dobrowolskyj's case, this more restricted policy has a less intrusive impact on the privacy interests of all detainees than a broader blanket search policy. The search policy also provided that the searches would be conducted in private without degradation or embarassment to either the inmate or the officer.

The security interests of the jail in conducting a search at this point were strong. Dobrowolskyj was about to come into direct contact with the general jail population, including prisoners who would then be moved into all sections of the jail. The jail had legitimate interests in preventing the flow of contraband into the other sections of the jail.

The reasonableness of the search policy is also indicated by the fact that it had previously been approved by

the district court in the consent decree in *Tate* v. *Frey*. The consent decree in this class action suit attempted to craft a search policy for Jefferson County Jail which was narrowly tailored to meet specific security needs. Applying the balancing test from *Bell*, we find that the security interests of the jail outweigh the privacy interests of the inmates in the circumstances of this case. Thus, Dobrowolskyj's search was not unreasonable and did not violate the fourth amendment. Accordingly, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No.: C75-0031-L(A)
C79-0492-L(A)-24
C79-0570-L(A)-34

DON TATE, et al. - - - - - - - *Plaintiffs*

v.

RICHARD FREY, et al. - - - - - - *Defendants*

ORDER CERTIFYING CLASS

Motion having been made, and the Court otherwise being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED, that the Plaintiff class be and hereby is certified and divided into four subclasses defined as follows:

a. The first subclass, represented by JACQUELINE HUNTER, is composed of all female prisoners who are now or will be confined in the Jefferson County Jail and are awaiting trial, and not serving sentence for any misdemeanor or felony conviction. This subclass shall be known as the "female pretrial detainee" subclass.

b. The second subclass, represented by DIANE BOLIN, is composed of all female prisoners who are now or will be incarcerated in the Jefferson County Jail for the purpose of serving sentence for a misdemeanor or felony conviction and shall be known as the "convicted female" subclass.

c. The third subclass, represented by ERVIN TYUS, is composed of all male prisoners who are now or will be confined in the Jefferson County Jail and are awaiting trial and not serving sentence for any misdemeanor or felony conviction. This subclass shall be known as the "male pretrial detainee" subclass.

d. The fourth subclass, represented by HUBERT RINGO is composed of all male prisoners who are or will be incarcerated in the Jefferson County Jail for the purpose of serving sentence for a misdemeanor or felony conviction and shall be known as the "convicted male" subclass.

The Plaintiff class shall consist of the four above-defined subclasses.

8 - 15 - 80
DATE

(s) Charles M. Allen
Honorable Charles M. Allen
United States District Court Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action Numbers:
C-75-0031-L(A)
C-79-0492-L(A)
C-79-0570-L(A)
C-83-0254-L(A)

DON TATE, et al., - - - - - - *Plaintiffs*

v.

RICHARD FREY, et al., - - - - - *Defendants*

EXCERPT
STIPULATION FOR SETTLEMENT OF CLASS ACTION

XXIII. SEARCHES

Defendants agree to establish policies addressing the search of inmates and inmate's property. Defendants shall have wide ranging discretion and latitude concerning the search of inmates and all areas and materials within the facility. The search policies should provide for the avoidance of unnecessary force, embarassment or indignity to the inmates. The use of non-intrusive sensors and other techniques of body inspection are encouraged.

Frequent unannounced searches of inmates, inmate living areas, the physical structure of the building and employees will be conducted as often as necessary to ensure the safety and security of the facility and all persons therein.

Definitions:

a. Frisk Search—A search of the person which is conducted by an employee touching the outer clothing of an inmate and feeling for large objects of contraband. Outer clothing such as coats, shoes, and hats are removable.

b. Strip Search—A search of the person which is conducted by an employee by visually inspecting the person following removal by the inmate of the inmate's clothing.

c. Body Cavity Search—A medically conducted search of the inmate's interior areas of body conducted under medical conditions, by medical personnel and with probable cause that the person has concealed within a body cavity or elsewhere within the body contraband.

The following general guidelines are incorporated into the jail search policies.

a. All inmates under the control of the jail are subject to search at all times.

b. Inmates will be searched by employees of their gender.

c. All strip and body cavity searches will be conducted in private.

d. All inmates entering or leaving the security perimeter will be strip searched, except inmates in the front holding areas who will only be strip searched upon reasonable belief that a strip search is required for security purposes as described in item "g" below.

e. All inmates coming into direct contact with a visitor will be strip searched.

f. All inmate property and living areas are subject to search at all times.

g. All inmates are subject to strip search upon reasonable belief that the inmate may be in possession of contraband.

h. All inmates are subject to frisk search at all times.

i. Inmates are subject to body cavity searches based upon probable cause supported by oath or affirmation.